

ONTARIO COURT OF JUSTICE

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HER MAJESTY THE QUEEN

v.

DEREK J. DUNLOP

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P R O C E E D I N G S

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BEFORE THE HONOURABLE JUSTICE P.J. WRIGHT

on June 10, 2008.

at NEWMARKET, Ontario.

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CHARGES: Sec 253(b) C.C. - Over 80 mg Alcohol
s. 255(2) C.C. - Impaired, causing bodily harm X2

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APPEARANCES:

A. Ghosh

Counsel for the Crown

S. Sager

Counsel for Mr. Dunlop

M. Segal

Friend of the Court

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TUESDAY, JUNE 10, 2008

MR. GHOSH: Derek Dunlop, seven through to nine.

THE COURT: Yes.

MR. GHOSH: Mr. Sager is here for that.

MR. SAGER: Yes, good morning Your Honour.

THE COURT: Good morning.

MR. SAGER: Sager, for the record, S-A-G-E-R, first initial "S". I think you may or may not have an application before you Your Honour?

THE COURT: I do. My materials are in my office.

I'm going to have to go and retrieve them.

MR. GHOSH: You may not need them Your Honour.

THE COURT: Oh, all right. Fine, thank you.

MR. SAGER: Yes. The application, a copy of which you apparently have in your hand there....

THE COURT: Excuse me. Is Mr. Dunlop here?

MR. SAGER: Yes, he's here.

THE COURT: Stand up please Mr. Dunlop, beside your counsel. Thank you. Yes, go ahead please.

MR. SAGER: Yes. Mr. Dunlap(sic), for the record, is before the court. Mr. Dunlap put forward another application, a bit to my displeasure, but not to my surprise. This has been a tremendous strain on him which I'll explain further during my submissions. There's a logistics problem here between North Bay and my office in Richmond Hill. We've pretty well had to do everything by way of email. I'll admit by reading Mr. Dunlap's application he may not have understood some of the things I was trying to get across to him. Through the anxiety and other problems that he suffers as a result of all of

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these matters, put forward this application himself. He didn't consult a lawyer. He completely drafted it himself. I've spoken to him at length, this morning, outside in the hall, as to how I feel this application may be viewed and how it may be handled by Your Honour. And as a result, he has advised me that he does not want to proceed with this application or any part thereof, and he wants to deal with his matter this morning, to put it behind him. He does not want to, nor has he ever wanted to waste the court's time. There again, I'll make that clear during my submission. But he's here to answer your questions with respect to the application Your Honour. I'm still prepared to continue on the record, and deal with this, this morning at Mr. Dunlop's discretion.

THE COURT: Mr. Ghosh, your submissions?

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MR. GHOSH: Yes, Your Honour. I - the Crown clearly prefers Mr. Sager remain on the record, so I'm certainly satisfied that Mr. Dunlop abandoned his application. The one concern I have, given that the application was filed by Mr. Dunlop, my friend and I, prior to the late date, had commenced discussions about an agreed statement of facts relating to plea that Mr. Dunlop has entered. My friend today, having repaired his relationship with his client was in a position to receive instructions and speak to me about the agreed facts. We depart now, in a significant area which will require - and it's the extent of the alleged injuries that the

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victim impact evidence seems to make out. My friend naturally wishes some confirmation of a few things before - I can't abandon the alleged injuries that the complainant, or now victim, seems to have suggested in the victim impact statement. So to my friend's credit, he had no opportunity to receive instructions from his client to have these discussions before today with me. But I know this matter has a long procedural history, but in order to proceed with the sentencing today, I don't wish to unnecessarily embark on a *Gardiner*, if my friend being furnished with some documents will obviate that need. So I'll let my friend decide what he wants to do.

THE COURT: Well, we've got the day. I prefer that we do that if we can. Secondly, today's proceedings were for the purposes of establishing the facts, and a finding as well. And whatever the nature of the injuries are, or were, apart from the general comment that there were injuries sufficient to establish the offence to which this gentleman has entered a plea, we can make our findings, and if counsel in the passage of time this morning would be able to deal with that particular issue fine. If not, we will receive what facts we can, and then counsel will have to make a decision to whether there's going to be a *Gardiner* hearing or not. I don't want to leave today without having made the findings, because the plea has been entered; without determining what the facts are, in

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relation to the sentencing, because the nature and scope of the injuries are not really required for purposes of making a finding beyond simply a determination that there was bodily harm.

MR. GHOSH: Quite right.

THE COURT: So the issues that you're talking will play into the issue of sentence. It may be that a *Gardiner* hearing would be required. I certainly am going to be ordering a pre-sentence report in any event regardless of counsel's view on the matter, because there has been a long and unfortunate, tortured history to this matter. So I'm going to be dealing with this matter very much in accordance with the rules.

MR. GHOSH: That's helpful Your Honour. Thank you very much. May I have a word with my friend and maybe given Your Honour's direction we can proceed right now with this. So Your Honour, given Your Honour's comments, I've spoken to my friend and we're prepared to proceed with the facts now, with further facts to be furnished as necessary.

THE COURT: Just give me a moment please. Mr. Dunlop, I'm going to address you directly. You have counsel, but this is the practice that I engage in with respect to individuals who come before me, so this is nothing unusual. But you will recall that on the 6th of March, 2008, following a full plea comprehension inquiry which I conducted of you, you entered a plea of guilty to the offence of operating a motor

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vehicle - pardon me, hand me the information again - operating a motor vehicle while impaired by drug or alcohol, and operated that motor vehicle thereby causing bodily harm to Terry Corbett, contrary to section 255(2) of the Criminal Code. This matter was initially adjourned to the 10th of April, 2008 at 2:15 in court room 201 for facts, finding and sentence. I can, if you wish, go through the history of what has occurred since then, but there have been delays occasioned either by your counsel or your request and if matters are settled on today's date, for the determination of the facts and the making of the necessary findings, and if possible, sentence. The first part will be completed today, the facts and the finding. The second part, the sentence, may or may not, depending upon what discussions take place between your counsel and Mr. Ghosh. Do you understand that?

MR. DUNLOP: Yes, I do.

THE COURT: And I'm saying that, in view of the submissions that have been made by your counsel Mr. Sager that you are abandoning, in its entirety this application which has been presented to the court and which I understand was drafted by you on your own. Is that correct?

MR. DUNLOP: Yes, it is Your Honour.

THE COURT: Thank you. I'll read the endorsement that I have placed on the back of the notice of application, and I'm going to ask each of the three of you if you confirm this endorsement.

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"June 10th, 2008, at 10:30 a.m. Mr. Ghosh appearing for the Crown, Mr. Sager appearing for Derek James Dunlop. Derek James Dunlop appearing in person. Derek James Dunlop confirmed he prepared and filed the notice of application and all supporting materials on his own, and without advice from or instructions to his counsel, Mr. Sager. Upon inquiry by the court the defendant confirms that he wishes the application be dismissed as abandoned in its entirety. Order to go, to dismiss application on consent of Mr. Ghosh, Mr. Sager and the defendant." Mr. Ghosh?
MR. GHOSH: Yes, quite right.

THE COURT: Mr. Sager?

MR. SAGER: Yes.

THE COURT: Mr. Dunlop?

MR. DUNLOP: Yes.

THE COURT: Thank you. Now are we in a position to receive the facts with respect to the plea, so that I am in a position to make a finding at this time?

MR. SAGER: Yes.

THE COURT: Thank you. Would you please sit down then, Mr. Dunlop. Listen carefully; I'll have some questions to ask you when Mr. Ghosh has concluded his proceedings. Mr. Ghosh?

MR. GHOSH: Thank you and Your Honour what I propose to do is read in the agreed facts, and I'll file a copy of the agreement.

THE COURT: Thank you.

MR. GHOSH: Derek James Dunlop, impaired driving causing bodily harm, agreed statement of facts.

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On October 22nd, 2006 at approximately 8:30 p.m. a Honda Civic operated by Derek James Dunlop was travelling on Highway 400 northbound, in Aurora. This vehicle was observed to be speeding above 130 kilometres an hour in a 100 kilometre an hour zone, weaving within its lane, and crossing over into other lanes. It was raining, and Mr. Dunlop lost control of his vehicle, and it slid across three lanes, collided with two other vehicles, and rolled over into the ditch at least four times. The debris from the accident flew into oncoming traffic lanes from Highway 400 southbound. There was extensive damage to all three vehicles. Mr. Dunlop's vehicle was in the right ditch of the northbound lanes. One of the other vehicles involved had the entire passenger side sheared off, and the last vehicle was sitting facing southbound with the driver's side against the ground. Police and emergency services were contacted. Mr. Dunlop was investigated. A strong odour of alcohol was detected on his breath. He admitted to consuming five beers prior to the accident. He appeared unsteady on his feet. He received treatment from E.M.S. at the scene. Mr. Dunlop was arrested for impaired operation of a motor vehicle at 9:10 p.m., read his rights to counsel, and cautioned. He was read a demand to provide samples of breath - suitable samples of breath. At 10:24 p.m. the first sample of breath was collected.

THE COURT: I'm sorry, what time?

MR. GHOSH: At 10:24 p.m....

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THE COURT: Yes.

MR. GHOSH: ...the first sample of breath was collected, 160 milligrams of alcohol in 100 millilitres of blood. At 10:47 p.m. a second sample of breath was collected, 150 milligrams of alcohol in 100 millilitres of blood. A toxicology report tracing back the expected blood alcohol concentration at the time of driving confirmed a blood alcohol concentration of over 170 milligrams of alcohol in 100 millilitres of blood. The drivers of the other vehicles involved in the accident suffered injuries. Their names are Mr. Tejeet Sodhi, and Mr. Terry Corbett. Those are the facts being alleged and if I may furnish the court with a copy of this.

THE COURT: These are injuries which caused bodily harm?

MR. GHOSH: Yes, I'm sorry.

THE COURT: Is that correct, within the meaning of that phrase?

MR. SAGER: It is Your Honour.

THE COURT: I'm wondering if I can ask you to endorse that at the bottom. Apart from just injuries causing bodily harm in accordance with the provisions of the Criminal Code.

MR. GHOSH: Yes, thank you.

THE COURT: Thank you. Is that's an agreed upon statement of fact, and I understand that it is?

MR. SAGER: That is agreed, Your Honour.

THE COURT: Thank you.

MR. GHOSH: Thank you Your Honour. I've amended

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paragraph nine, "the driver's of the other vehicles involved in the accident suffered injuries. Tejeet Sodhi and Terry Corbett suffered injuries constituting bodily harm as defined in the Criminal Code."

THE COURT: Thank you. That agreed upon statement of facts Mr. Sager and Mr. Dunlop, could you stand up? First of all, I'll ask you Mr. Sager, is your information that those facts are substantially correct?

MR. SAGER: They are correct.

THE COURT: Thank you. Mr. Dunlop, do you agree that those facts are substantially correct?

MR. DUNLOP: Yes, I do.

THE COURT: Thank you. Based on those facts, and the admissions that have been made of the document called the agreed statement of facts will be Exhibit Number 1, in relation to the trial of these proceedings, and based upon the admission by the defendant directly and with the assistance of counsel, and Exhibit Number 1, I find the defendant guilty of the offence to which he entered a plea on March the 6th, namely, impaired operation of a motor vehicle causing bodily harm to Terry Corbett, contrary to section 255(2) of the Criminal Code. Thank you. You may sit down Mr. Dunlop. Speaking to sentence?

EXHIBIT NUMBER 1: Agreed statement of facts.
Produced and marked.

MR. GHOSH: Yes Your Honour. My friend and I have discussed this matter a moment ago, and the

injuries - the extent of the injuries being one aspect of the Crown's position, could this matter be held down briefly.

THE COURT: Yes.

MR. GHOSH: We'll see if we can sort out that aspect of the matter before we continue.

THE COURT: That's fine. We can do that, and we will stand this matter down then, pending those discussions, and I would ask counsel as well, that if there is utility in obtaining a pre-sentence report, certainly the court would be anxious to have the benefit of that. However, if counsel are able to deal with the issue of the injuries and secondarily with the sufficient facts based upon the defendant's background and so forth, that I can deal with sentence, we could do it today. I'm not going to put the defendant into a position where there may be an outstanding issue, of course, but if there is an issue with respect to the extent of injuries, then counsel can speak to the Trial Coordinator and arrange a date for a *Gardiner* hearing.

MR. SAGER: There has been extensive discussions between Mr. Ghosh and myself, by way of fax and telephone communication, and in person, with respect to this matter, and I think that we should - we will be able to complete this today...

THE COURT: That's good.

MR. SAGER: ...without the necessity of a *Gardiner* hearing.

THE COURT: Well, that's obviously to be

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preferred, but I want counsel and the defendant to understand that principles of sentencing are what they are, and I have to be guided by what I can do today, and I'm not forcing anybody into a position today. If it can be reached, that's of course to be preferred, but if not then we'll determine another date.

MR. SAGER: Mr. Dunlap has spoke to me this morning, assuring me that he is sorry for delaying the court, if he has in any way. He just wants to be dealt with fairly in this matter and have it dispensed with today if possible.

THE COURT: You needn't apologise. I understand entirely, he's exercising his rights, and he will receive a fair hearing.

MR. SAGER: Thanks Your Honour.

MR. GHOSH: And the Crown certainly is not submitting that any delay occasion in this process is at all an aggravating feature on this matter.

THE COURT: Thank you very much. There you have it, Mr. Sager and Mr. Dunlop. So, if you could continue those discussions and if we can reach an agreement, great, if not, then we'll deal with the consequences of how we'll have to handle it.

MR. SAGER: Thank you.

THE COURT: Thank you. We'll stand this matter down.

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U P O N R E S ' U M I N G :

5 MR. GHOSH: Yes, Your Honour. My friend and I
have discussed over the morning additional
agreed facts for the purposes of the sentencing,
and if Your Honour would permit me to read in
the further facts that have been agreed to
regarding the alleged injuries.

10 THE COURT: And will that be filed as well as an
exhibit on sentence, or do you want to just read
it in?

MR. GHOSH: Could I read it in? There's some hand
written scribbles on it.

15 THE COURT: Thank you. This is by way of
agreement?

MR. SAGER: Yes, it is.

THE COURT: Thank you.

20 MR. GHOSH: Victim number one, Mr. Tejeet Sodhi
suffered the following injuries caused by the
accident that Mr. Dunlop had instigated;
multiple rib bruises, multiple right back
scapula fractures, essentially the shoulder,
bruises to hips and right elbow, soft tissue
25 shoulder injuries.

THE COURT: Was he in the vehicle being driven by
the defendant or in some other vehicle?

30 MR. GHOSH: No, if the facts were unclear Your
Honour, each of the two victims that suffered
injuries were driving their own cars, so they're
in a second and third vehicle, independent of
Mr. Dunlop.

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THE COURT: You did indicate three, I just wanted to know where these people were, that's all.

MR. GHOSH: That's right. They're all in separate cars.

THE COURT: Thank you. You left of at soft tissue shoulder injury.

MR. GHOSH: Yes, that's the extent of Mr. Tejeet's agreed upon - Mr. Sodhi's agreed upon injuries. Mr. Terry Corbett; cuts to the right hand, cuts from broken glass to left side of face, pain in left shoulder blade, abrasions on neck and chest from seat belt, swelling of face and inside of mouth, numbness in small finger on left hand. All injuries at the time of the victim impact statement had healed except for numbness in the finger.

THE COURT: That is all the injuries to both victims?

MR. GHOSH: To Mr. Corbett.

THE COURT: Yes.

MR. GHOSH: And each of these injuries are contextualised by the victim impact evidence that have been provided on the last occasion. Do we have those as exhibits Your Honour, the victim impact evidence?

THE COURT: I don't believe so.

MR. GHOSH: Oh, okay. I thought they had been filed. What I will do Your Honour, I don't intend to read them in, but I will show my friend, which he has copies of them already.

MR. SAGER: Okay.

MR. GHOSH: If I may file at this time the victim

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impact statements of Tejeet Sodhi, and Terry Corbett.

THE COURT: How do you spell the name of the first victim again?

MR. GHOSH: Tejeet, T-E-J-E-E-T Sodhi, S-O-D-H-I.

THE COURT: Okay.

MR. GHOSH: And Terry is T-E-R-R-Y, Corbett.

THE COURT: All right, the victim impact statement of Tejeet Sodhi will be Exhibit Number 1 on sentence, and the victim impact statement of Terry Corbett will be Exhibit Number 2 on sentence.

EXHIBIT NUMBER 1: Victim Impact Statement of Tejeet Sodhi. Produced and marked.

EXHIBIT NUMBER 2: Victim Impact Statement of Terry Corbett. Produced and marked.

MADAME CLERK: Was the agreed statement of facts not Exhibit 1?

THE COURT: It's Exhibit 1, but would it not be an agreed upon statement of facts in relation to the trial? That's what was required for a finding.

MR. GHOSH: That's quite fine.

THE COURT: So I don't really believe that will be Exhibit 1 on sentence. These two exhibits, 1 and 2, on sentence, just so that our record is clear.

MR. GHOSH: The next item - proposed exhibit for Mr. Dunlop's matter is Mr. Dunlop's alleged driving and criminal record.

THE COURT: That will be Exhibit 3 on sentence.

MR. GHOSH: Yes, thank you. The only one entry I

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wish to state on the record is a June 1991 criminal conviction for over 80, driving while over 80.

EXHIBIT NUMBER 3: Driving and Criminal record of Mr. Dunlop. Produced and marked.

THE COURT: Thank you.

MR. GHOSH: And with that, Your Honour, if I may, I'll spend a few minutes in submissions. I won't be very long.

THE COURT: Thank you.

MR. GHOSH: Your Honour I'll firstly state the Crown's submission as to disposition. I'm proposing six months of institutional custody, 18 months of probation to follow. I will suggest a driving prohibition for two years. It's being proposed to attach to the probation, subject to Your Honour of course, that Mr. Dunlop attend for counselling for alcohol abuse as directed by probation, that he report to probation as required regarding counselling, and any other appropriate conditions that Your Honour may deem appropriate. I'm not going to suggest an abstention from alcohol. Mr. Dunlop may or may not suffer from a chronic illness in that regard, but I'll let Mr. Sager make some submissions to you in that area. Your Honour the Crown submission is rooted in a few circumstances. Firstly, the facts on their face that have been agreed to are troubling and in my submission warrant the attention of principles of sentencing in terms of denunciation and deterrence. Firstly, drinking and driving on its

own is highly troubling but when there's an accident of the nature that has been agreed to, with the injuries that have been acknowledged in the agreed facts, coupled with the victim impact evidence that is before Your Honour that the complainants have - or now victims, have suffered more than fleeting injuries as a result of this very serious accident. In my submission, that begins to suggest that perhaps institutional custody would be appropriate for Mr. Dunlop. But there are a couple of other aggravating features which I would wish to draw to Your Honour's attention. Firstly, the statutorily aggravating readings at the time of driving; Mr. Dunlop at the time of driving, according to the toxicologist report, it's been agreed that he would have been in excess of 170 milligrams of alcohol in 100 millilitres of blood. The Criminal Code tells us that that reading on its face is aggravating for sentence. The nature of the accident itself, already, I've made submissions that there are some horrendously frightening facts particularly in the context of the amount of alcohol that seems to have been consumed. Also troubling Your Honour is the prior over 80 conviction. I appreciate it's very dated, it's some 17 years old, but what that does indicate is that Mr. Dunlop has had some difficulties in terms of consuming alcohol and driving in the past. While the context has to be there that he has - the record is very old, we - in my submission it

cannot be ignored in terms of treating Mr. Dunlop as someone who may or may not have had this difficulty in the past. He clearly has, and in my submission certainly should have known better. I appreciate, I have had extensive discussions with my friend regarding this matter, and I will anticipate my friend's entirely appropriate submissions that his client had some situational stressors at around the time of this accident that may have involved a relapse into binge drinking or alcohol consumption at around the time of the driving. I've thought carefully about my friend's submission in deciding whether or not a Crown's submission for a conditional jail sentence would be appropriate. I will say this. Your Honour is not statutorily barred from considering obviously, the conditional jail sentence provision, nor does the case law preclude Your Honour from imposing such a disposition. Although my submission is for institutional jail, in my respectful submission, either a conditional jail or institutional jail would be a sustainable disposition on sentence. My position is for institutional jail for the reasons I've indicated, but I certainly have not ignored, in determining the quantum of jail that I'm proposing, and in assessing the disposition that may be appropriate for Mr. Dunlop from the Crown's perspective of Mr. Dunlop's personal circumstances. I'll let Mr. Sager elaborate on that in his submissions. But certainly

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regardless of how Your Honour determines this matter, I would suggest that counselling should be a significant portion of the disposition. I'll leave it to Your Honour.

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MR. SAGER: Yes, good afternoon Your Honour. This case is one that you have spent quite a bit of time on yourself. There's been a lengthy judicial pre-trial on this matter, at which time certain facts were put before you about Mr. Dunlap. What I would like to do is go back a bit before this accident occurred, because there are some relevant circumstances that I think you should be aware of to show the character of Mr. Dunlap and the type of truly responsible person he is. Prior to this accident some time Mr. Dunlap was a social worker working with the Barrie Children's Aid Society, and had been there for well over four years, and had done substantially good work for that organisation. In fact, after Mr. Dunlap had been charged with this driving offence, I met with Beth Barnier of the Crown's office who was originally to be the assigned Crown on this matter, but she was familiar with Mr. Dunlap and the quality of work that he had been performing at the Children's Aid Society in Barrie, and advised me that due to this knowledge, it would be unfair for her to continue on as the assigned Crown. After that, we started dealing with a variety of different Crown's because no one took the position of assigning themselves to the case or being assigned until my friend Mr. Ghosh volunteered

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to become the assigned Crown, so I only had one Crown to deal with. Mr. Dunlap is 37 years old. He is a - has graduated from high school, what he did was he continued on to Seneca College and continued there until he received a diploma in police sciences, after which he....

THE COURT: What was it again?

MR. SAGER: Police sciences at Seneca College - after which he continued on to Nipissing University, where he obtained an honours degree in sociology. During this period of time though, I might add that he was coaching baseball teams, and always there for young people that were in distress or need, he was like a big brother to a lot of young people that were in trouble, not only through economics, people - young people in trouble with the law, he was always there to help and counsel. He continued those efforts on with the Children's Aid Society in Barrie, and this is where things start to turn around in Mr. Dunlap's life. He became involved with a young woman who was also a social worker at the Children's Aid Society in Barrie, and they had an ongoing relationship. Neither of them had ever been married, nor - no children, and everything was going well for a short period of time, and then the relationship started to turn sour, and Mr. Dunlap didn't understand, so some domestic upheaval got started, eventually Mr. Dunlap started to cut off the relationship, because it was though well, he's in - his girlfriend was involved with somebody else but

wouldn't admit it. A short time later, Mr. Dunlap started suffering problems at work. He got demoted. This he couldn't understand, and there were complaints made through the proper channels about this demotion. Through some of this it came to be known that Mr. Dunlap's immediate supervisor was the man that was involved with his girlfriend. So we have a triangle, a love triangle here. Obviously very - Children's Aid Society is a small organisation, and there's the rumour mill, there's inside politics, so things became very bad for Mr. Dunlap at the Children's Aid Society. Now he had, up until this point, enjoyed a solid reputation with no problems whatsoever. Mr. - during the period of time that Mr. Dunlap, prior to his breaking up with this young woman, they got into an argument at her home, and he hit a wall with his fist, stormed out. A couple days later, everything cooled off, he came back and he repaired the damage. For some reason or other, unbeknownst to Mr. Dunlap, this young woman complained to the fellow that she was involved with, Mr. Dunlap's supervisor, which in turn, they called the police. Mr. Dunlap was charged with mischief to private property and was summarily fired from the Children's Aid Society. I assumed carriage of this particular file from Mary Hall, who was looking after it at the time. After a couple of meetings with the Barrie Crown, it was quite evident that these charges never should have been laid in the first

place, subsequently they were withdrawn. Now Mr. Dunlap in - during the course of dealing with these charges, had lost his job, he couldn't get another job. What he does in social services is a very small limited circle. Everybody knows everybody else. he certainly couldn't go back to his former employer, the Barrie Children's Aid Society and look for a reference. So one night when all this was going on, some friends invited him to go downtown to have a couple of drinks and a dinner. It was during this period of time that Mr. Dunlap went, had the drinks, had the dinner, and then proceeded home, and was involved in this subsequent accident. Since then, Mr. Dunlap has lost his job - or was losing his job, he couldn't make his mortgage payments. He's lost his home. Legal fees, trying to support himself, his savings have all been drained. Of course the accident took his car. Because he was charged with impaired, the insurance company won't repair the car. The car is a write off. So he has sustained substantial losses. On top of that, the reputation and trust that he had obtained through his years of work with the Children's Aid Society were destroyed by what in fact, in my respectful submission, was just bogus charges to get rid of him through his supervisor at the Children's Aid Society. In fact right now, not with me, there is a civil action has been commenced against the Children's Aid Society in Barrie for wrongful dismissal. I think at the time what they were trying to do,

was to formulate a constructive dismissal but when this event took place, they just thought it was quite easily just to have him charged, and fire him because he was charged with a criminal offence.

THE COURT: Which event?

MR. SAGER: This was the - where he was charged with mischief.

THE COURT: Mischief, the mischief charge, not the charge that's before the court.

MR. SAGER: No, no. The mischief charge.

THE COURT: Thank you.

MR. SAGER: That's - no, this - he'd already been fired as a result of this mischief incident. Of course then these charges compounded what had happened. Now Mr. Dunlap has - when this - after being charged of course he was put out on bail. His mother who is in the court today, 69 years old, couldn't act as a surety so his father, who is separated from his mother and is remarried. The stepmother, she became the surety for Mr. Dunlap. So he was released into her custody. This family has been a very strong cohesive unit for Mr. Dunlap. Now because he was residing with his father and his stepmother, Mrs. Dunlop, Derek's mother is a cancer victim and is currently on remission from having cancer. Derek had taken her to 35 radiation treatments at the hospital here in Toronto. She's had chemotherapy, currently she's in remission, but unfortunately due to the radiation, the amount of radiation that she had to undergo, she

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sustained other problems, but now she's under a doctor's care for these problems brought on by radiation. I have a letter from Mrs. Dunlop to the court, letting you know how she feels about her son; how she knows he's remorseful for what he has done, and what she feels he's going to do in the future. I have a copy of that letter if you'd like to peruse it, Your Honour.

THE COURT: Are you filing it as an exhibit then?

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MR. SAGER: I will be filing it as an exhibit.

THE COURT: That will be Exhibit Number 4 on sentence.

EXHIBIT NUMBER 4: Letter from Mrs. Dunlop.

Produced and marked.

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THE COURT: This letter is dated August 25th, 2007.

MR. SAGER: Yes.

THE COURT: It's now June 2008.

MR. SAGER: This was filed with my friend some time ago.

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THE COURT: Perhaps this letter should be given back to you and if mother is here, she can read it. If she wishes she can make any adjustments or amendments to it, most importantly, the date on it.

MR. SAGER: Fine. Would you like her to come up?

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THE COURT: No, that's not necessary. She can do that right from the body of the court. You're submitting this as an exhibit.

THE COURT: Her name is Mrs. Dunlop, is it?

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MR. SAGER: Mrs. Dunlop is....

THE COURT: Are you Mrs. Dunlop?

MRS. DUNLOP: Yes.

THE COURT: All right, thank you. Just have a look at that and perhaps you can give it back to Mr. Sager once you've reviewed it to see if it's still applicable, whether there's any changes or amendments that you'd like to make to it, the most important one from my perspective is the date. It's dated August the 25th, 2007. I'd like it to be accurate as of today's date, which is June the 10th, 2008, please.

MR. SAGER: Also Mr. Dunlap started attending A.A. meetings in the town where his stepmother and father resided, in Bonfield, Ontario. Now this letter also is from Mr. Dunlap's A.A. sponsor, but it's dated August also, of 2007. I wanted this gentleman to be here today, unfortunately he's in his 80's and he's an A.A. sponsor, so he can't make any adjustments, other than - I think this letter just on its face is enough, that Your Honour would take it into consideration.

THE COURT: Perhaps Mrs. Dunlop would be the better judge of that. I appreciate this is authored by somebody else, but I'd like her to read that. Maybe she can tell me, or tell you and you can tell me how accurate that letter is.

MR. SAGER: If I can just hand this letter to Mrs. Dunlop.

THE COURT: Who's the person that signed that letter?

MR. SAGER: This is signed by a Mr. Arthur W. Messon.

THE COURT: Do you know that person Mrs. Dunlop?

MRS. DUNLOP: No, I don't.

THE COURT: Do you know anything about your son's comings and goings to A.A.?

MRS. DUNLOP: Just that he said he went to them, and then this person had phoned a couple of times to congratulate him for, like a year's abstaining from alcohol and kept in touch with him a few times, but I did not know this.

THE COURT: When was the last time that this gentleman spoke with your son, to your knowledge?

MRS. DUNLOP: I don't know, I'm sorry.

THE COURT: Thank you. You can return that letter to Mr. Sager. Exhibit Number 5.

EXHIBIT NUMBER 5: Letter from Arthur W. Messon. Produced and marked.

MR. SAGER: Would you like to produce this Your Honour?

THE COURT: Sure. When was it that this gentleman spoke to you about your son's abstinence from alcohol for a year, Mrs. Dunlop, do you know?

MRS. DUNLOP: Pardon me?

THE COURT: Do you know when it was that the person phoned you?

MRS. DUNLOP: I think it was probably in the winter some time, but I'm not quite sure of the date.

THE COURT: Before or after Christmas?

MRS. DUNLOP: After Christmas.

THE COURT: So some time in 2008, is that correct?

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MRS. DUNLOP: Two thousand and - yeah, sometime in 2008.

THE COURT: Thank you. Mr. Sager, yes?

MR. SAGER: Yes, Your Honour. What we have here is a situation, number one, and I know it doesn't have anything to do with this motor vehicle accident, other than to show you that Mr. Dunlap is a responsible person. He's a university graduate. He spent the better part of his working life working with troubled and needy youth. Now he worked very closely with the Barrie Police Department, dealing with troubled youth, so they all know him. Being a person of responsibility to lose the job that he lost, under the circumstances that he lost it, put him under enormous psychological stress. I know he was under a lot of stress personally by the emails that he kept sending me. I can see in the body of them that he was under a lot of stress. In January of 2007 Mr. Dunlap gave me two letters. These letters have never been sent to the victims of these accidents - of this accident - stating his remorse, and how badly he felt for what he had done. I obviously felt, at the time, it wasn't proper to send these letters out to the victims. Speaking with my friend I gave him a couple copies of these letters. I think they say a lot again, about the person you have before you, the remorse that he has for what's happened here. By looking again, back at all the circumstances, such a chain of events had gone along the way to bring Mr. Dunlap to

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where he is here today. If I can, I'd like to submit these two letters, even though they've never been sent to the victims, they're dated in January of 2007, but I do think they say quite a bit.

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THE COURT: Are they going to be sent to the victims?

MR. SAGER: He would like to send them to the victims.

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MR. GHOSH: Does the Crown have a copy of those already?

MR. SAGER: They do.

MR. GHOSH: Okay. Then, yes, Your Honour, they will be sent to the victims.

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THE COURT: Give me a moment please. Have you seen these letters...

MR. GHOSH: I have, yes.

THE COURT: ...Mr. Ghosh?

MR. GHOSH: Thank you.

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THE COURT: The letter to Mr. Sodhi will be Exhibit Number 6.

EXHIBIT NUMBER 6: Letter to Mr. Sodhi from Mr. Dunlop. Produced and marked.

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THE COURT: The letter to Mr. Corbett, this will be Exhibit Number 7 on sentence.

EXHIBIT NUBMER 7: Letter to Mr. Corbett from Mr. Dunlop. Produced and marked.

THE COURT: Am I right on those numbers?

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MADAME CLERK: There's just the letter, Your Honour, I have noted it so...

THE COURT: Okay.

MADAME CLERK: ...when we're all said and done I

can mark it.

THE COURT: Perfect.

MR. SAGER: I might add, I said earlier that Mr. Dunlap has a strong base in his family. Even though his mother is not in the best of health, her son has been with her and taking care of her for the last year. There was a change in the bail conditions allowing him to move from the residence of his father and stepmother in with his mother, in order to better take care of her needs.

THE COURT: Is that where he lives now?

MR. SAGER: Yes, and even though she is not well, you see she is here before you today, she has attended every hearing that Mr. Dunlap has been required to attend in this matter, as well as his father and stepmother. He's not here today, because he's a pipeline inspector, and he was injured on the job. This is the only appearance that he has not attended, otherwise he's been here. In fact if you recall, Your Honour, the last time we were before you when Mr. Dunlap entered his plea, his father was standing directly beside him in the court room. So we - he has that network helping at home. One of - during the hearing, one of the hearings we were at, Your Honour asked me if I could show you or assure you that this drinking problem was not something that was going to reoccur. Having - after everything that Mr. Dunlap's gone through, we speak of a conviction 17 years ago, I think it shows that up 'til that point, Mr. Dunlap had

no problems with alcohol. He admits freely that when all this pressure started; he's fired from a job which he felt was truly not called for, and that's being fought, that's another issue, he started drinking again.

THE COURT: When was that?

MR. SAGER: He started drinking again as a result of all the pressures that were put on him because of his work in Barrie, and what had happened to him in Barrie.

THE COURT: When was he fired?

MR. SAGER: That was May 2006. Now Mr. Dunlap is looking for another sponsor in the - up in North Bay, so he can continue the counselling and working with other alcoholics. He has no problem continuing to do that, because he doesn't want any more problems in the future. You have a letter from his sponsor, which I've entered in as an exhibit, showing that Mr. Dunlap was a good candidate in the A.A. program, and that he did very, very well in there, and even sponsored - with all his years of experience, like I said, he's a man in his 80's, who'd been an alcoholic pretty much his entire life, said that Derek, in his opinion, was not somebody that was going to reoffend. There's a tremendous amount of remorse, depression over what has happened to him, not just because of the Barrie incident, but because he's the type of person that so empathises with other people, I have found, that he's literally lived at home in a self imposed cell since this happened. He hasn't worked, he

doesn't eat properly, he's just - of course he's not drinking. All he's doing is helping his mother out, waiting for this to all come to a conclusion. But respectfully Your Honour, I feel that this gentleman before you is a responsible individual. He's not a person that is going to reoffend, as my friend brought out in the criminal record, we have a historical charge, 17 years ago with no problems whatsoever. There are a number of facts here, circumstances that befell this gentleman where he was, in my opinion, respectfully submitted to you, improperly treated by supervisory staff at the Barrie Children's Aid Society. It was done just to meet their own purposes, and he was - eventually became the victim of all that, so he's had a difficult time even trusting people. He now sits before you in the sincere hope that you will believe that he will not offend - reoffend, that he has a great deal of remorse. I think the letters have been put before you. They were written back in 2007 to the two victims of this accident. He feels a tragic sense of remorse for what has happened, and that comes from a responsible person, I respectfully submit. I truly believe in a case such as this, where you have a man who has accomplished as much as he has, has had no problems with the police for 17 years, has continued to serve the community in the capacity that he did, where one of the Crown attorney's here, knows of his work, and felt it was improper for her to continue on

in the prosecution, have it reassigned to somebody else, where this man has shown the extent of his remorse by writing the letters that he has, I don't think you're going to see someone who's going to reoffend now. When we look at penalty, there must be some deterrent. I think anyone that looks at what Mr. Dunlap has lost as a result of what he has done, like I said, he's lost his car, he's lost his life savings, he's lost his house. Prior to that, he lost his job. He has suffered a great deal, lost a great deal as a result of his actions. I think I can safely assure you, this isn't something that's going to happen to this type of gentleman. I respectfully submit that if he is allowed to serve a conditional sentence, under house arrest with his mother, the needs of the people are being met. Mr. Dunlap is still at home to assist his mother. As far as continuing on with counselling, Mr. Dunlap has absolutely no argument with that. He's willing to do that, 'cause he doesn't want anything like this to happen again. Under his own power he's going to get back in with A.A. again. I think Mr. Dunlap is truly a person who is deserving of a conditional sentence. There's no way that he should be serving time in jail for this - this particular violation. He - the injuries that my friend has spoke of this morning, the medical report that's part of the disclosure, for one of the injuries that suffered a fractured scapula, he was in the hospital overnight for pain

management and sent home the next morning.

THE COURT: Not to confuse issues, but let me just understand your submissions. Is your submission one that I should entertain a conditional sentence?

MR. SAGER: It is.

THE COURT: So when you say there's no way he should spend time in jail, that's a bit of a contradiction.

MR. SAGER: I apologise. I'll just take....

THE COURT: Well, you don't have to apologise, I just want to be clear.

MR. SAGER: I'll take two steps backwards. Yes, I think, if there is an order for incarceration, I don't think it should be in an institution. I think it should be - he should be able to serve a sentence under house arrest.

THE COURT: But again, I come back to what I asked just a moment ago. Are you making a submission that this particular situation warrants a custodial disposition but that he qualifies under section 742 for a conditional sentence?

MR. SAGER: Yes, I do. Yes. I think Mr. - you have to realise something. On the instructions given to me by Mr. Dunlap, he admits his responsibility. He knows he did something seriously wrong. I keep coming back that he is an individual who is a responsible individual.

THE COURT: Partially your argument then, with respect to these submissions on conditional sentence under the four prongs of the *Proulx*

decision, rather than what he doesn't or does deserve, which plays no part in that analysis at all. Number one, this is a matter in which there's no minimum, right?

MR. SAGER: That's right.

THE COURT: Number two, the Crown is not asking for two years...

MR. SAGER: That's right.

THE COURT: ...so that particular ground is satisfied. Number three is the risk of reoffending, and number four are the principles under section 718. What evidence do I have before me that would allow me to conclude that the risk of reoffending isn't here? I have damaged goods, that's the way you've described your client. He's still damaged and still suffering. I had an antiquated, outdated report from somebody at the A.A. that says that this man was a good person back last year. I have no psychological assessment that talks about risk, and I have nothing that deals with the current situation regarding alcohol. Those are the two concerns. I've got to protect the community with this sentence too, because of course that's what Justice....

MR. SAGER: I realise that.

THE COURT: That's what Mr. Justice Lamer said in Proulx. The risk of reoffending is a paramount matter, and the principles of sentencing under section 718. Now Mr. Ghosh has indicated, and very forcefully, that this is a matter which qualifies under section 718 as one of those

5 offences in which the defendant is required to be separated from society and placed into custody, however, he agrees that there - a conditional sentence may, based upon the submissions that are being made by defence, be sustainable. So help me to understand.

MR. SAGER: I....

10 THE COURT: Because I've got to analyse this. The calculus of my analysis has to play into the four part test enunciated by Mr. Justice Lamer in Proulx, not on the basis of what somebody deserves or doesn't deserve, but on those four bases. We have two of them then. How, on the basis of what I've heard today, and the evidence that's been presented, do I deal with the third and fourth prong of the test which I must consider in the face of the Crown's submissions which while not necessarily opposed to a conditional sentence, certainly urged custody.

15 MR. SAGER: I - let me go back to charges that were 17 years ago.

20 THE COURT: Let's stay focused on the two points that I've asked, if you don't mind, and try to direct this. We can go back to what happened 17 years ago in a minute. I need some submissions and evidence on the four prong test set out by Mr. Justice Lamer to meet the conditional sentence criteria set out in Proulx. We'll deal with 17 years ago in a minute, by all means. But I need that.

25 MR. SAGER: Well, I think you have a - number one, the - you say you have an outdated report

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from somebody from the - who is from A.A. Mrs. Dunlop has advised you that this gentleman phoned some time after Christmas to congratulate Mr. Dunlap on staying away from alcohol. My submission is that he's continued to do this. He's also - wants to continue on in a program of A.A. or if there's imposed some probation order, if there's some psychologist....

THE COURT: Can you tell me what's been done in that regard? He's written a letter of apology more than a year ago, which wasn't sent, and I understand that, but what's he been doing, apart from some anecdotal information in a letter that's dated almost a year, what has been happening? Have we approached a psychologist? This is a man who's a social worker, how would have access at least, at a minimum I would think, to that kind of information. What has been done about accessing a psychologist or a doctor with regard to providing me with some evidence that this man is taking control of this issue, and that the risk of reoffending is low, or at least not high?

MR. SAGER: Unfortunately at the moment I can't offer you that, other than what I've given you in this report today - this letter from the A.A. member. The fact that Mr. Dunlap, while he's moved from his father....

THE COURT: Do you want time to consider that position?

MR. SAGER: Pardon me?

THE COURT: Do you want time to consider that? I

think - I'm not telling you how to run your case, Mr. Sager, but it seems to me...

MR. SAGER: If you....

5 THE COURT: ...if you want me to deal with the issues of risk and the principles approach set out in section 718 I have to have some - some reliable evidence that is reasonably current. Is that available?

10 MR. SAGER: Well, Mr. Dunlap, since he's moved back to North Bay, my understanding, is seeking out a psychologist through A.A. that's specialised or dealt with alcoholic problems. This is what he's working on, but has not been done yet. Now he just started - he just moved back in with his mother a short time ago.

15 THE COURT: When - what's a short time ago?

MR. SAGER: How many months ago was it now? There was a revision bail.

MRS. DUNLOP: I've written some more to this letter.

20 THE COURT: Okay, could we just stay focused. When did your son come back to live with you?

MRS. DUNLOP: September, '07.

THE COURT: September.

MRS. DUNLOP: Yes.

25 MR. SAGER: Well, I note - talking with Mr. Dunlap, he's been dealing with some of his mother's needs, because she's been quite sick. He hasn't gone - like I said, he hasn't gone outside the house. If Your Honour feels, or would permit, if you feel that - and after what Mrs. Dunlop has to say, 'cause her son's been

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living with her now for this period of time, and made some astute observations, if you feel that you need anything beyond that, with respect to a psychological report, I would ask that the matter be put over in order for us to obtain that for you.

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THE COURT: I'm not saying that - I'm not running the case, Mr. Sager, I'm not the advocate here, but I need something that addresses the concerns the community would have. We have a repeat offender here, a serious motor vehicle accident; high levels, of alcohol, where people were badly injured. The community needs to know if I'm going to put him in a situation where he's going to serve his sentence in the community, that the risk of reoffending has at least been assessed and that the sentencing principles set out in section 718 have been addressed in some - it doesn't have to be in an elaborate construct, but something.

MR. SAGER: Okay.

THE COURT: Something more than what I have right now.

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MR. SAGER: With all due respect - respectfully Your Honour, what I've tried to put forward here is a 17 year old charge, where there's been no problems whatsoever. A man that has been involved in a serious problem with his work, where there have been unfounded charges laid against him, now - and he's worked - he's worked through this. Now he's gone and he's commenced a civil action against the Children's Aid Society

in Barrie. So things are progressing that way. He attended, while living with his father, A.A. He got a good report from A.A. Because of his mother's health, he asked to have his residence changed pursuant to his bail conditions. That was granted. He's been there for nine months, yes, looking after his mother. But we're also, in my submissions, I've put forward the fact that we're dealing with a very responsible person who's never had any problem for 17 years. I'm quite certain, Your Honour, that if I were to get Mr. Dunlap to see a psychologist, we're going to get basically the same report back that you have in that letter from the gentleman from A.A. I mean, that's a glowing letter of how he was taking care of himself while he was attending those meetings in A.A. There's no doubt in that gentleman's mind, who's been dealing with this type of problem his entire life, according to that letter, in how he felt about Mr. Dunlap, that you have a - there's a possibility of this man reoffending. He is a responsible highly educated gentleman, who's given himself totally out to assisting young people. The only thing I could suggest Your Honour, if Your Honour feels that I have not put forward enough information to make you feel comfortable to take a chance on this young man, then I would ask that this matter be put over until such time as I can get a psychological profile for you with respect to Mr. Dunlap. But I think from what I've seen of this man, from

what I've read and understand, I don't think it's going to enlighten you any more than that letter.

THE COURT: Do you have a date in mind?

MR. SAGER: To return?

THE COURT: Yes.

MR. SAGER: Well, it's a matter of - it's how soon can I - can he find somebody up in the North Bay area. I don't know.

THE COURT: Well he's had enough time to get a law suit organised. He's had enough time to do a great number of different things, but he hasn't deal with the issue of a risk assessment, and I don't have any medical reports. We need something that demonstrates that.

MR. SAGER: Four to six weeks? Bear with me here.

THE COURT: It's going to have to be more than that. Six weeks puts us into July. I'm not here during the month of July. But I am here during the month of August, so I can deal with this matter any time after the 5th of August on any of the dates I'm available. I don't know what your schedule's like Mr. Ghosh.

MR. GHOSH: Well, I'm indifferent Your Honour. I'll try to follow it, but I may be taken away to Orillia for a involved prosecution for a couple of months, so I'll leave it to my colleague. My submissions are in, and so....

THE COURT: I understand that. Do you have a date in August in mind?

MR. SAGER: Unfortunately I'm down in the United States almost the entire month of August.

THE COURT: All right. That gives Mr. Dunlop lots of time to something organised for early September then. I'm going to impose the driving prohibition today.

MR. GHOSH: That's fine.

THE COURT: And the restriction on driving. That part of the sentence I'm going to impose today.

MR. SAGER: May I speak to that Your Honour?

THE COURT: Yes, you certainly may. But let's just deal with the date first of all, and you give me a date when you're available.

MR. SAGER: Almost any date in September right at the moment.

THE COURT: Would it be best on a 201 day or on a trial day, Mr. Ghosh?

MR. GHOSH: Perhaps in 201 court, at 2:15? Does that assist my friend as well?

THE COURT: The 12th of September, which is a Friday, at 2:15?

MR. SAGER: The....

THE COURT: How does that sound Mr. Sager?

MR. SAGER: At 2:15?

THE COURT: Yes.

MR. SAGER: That's fine.

THE COURT: Do you wish me to order a pre-sentence report? That might assist in activating the ability to get the kind of risk assessment that we're talking about?

MR. SAGER: Yes, Your Honour.

THE COURT: I'll order a pre-sentence report, and a risk assessment dealing with alcohol. I'm going to order a pre-sentence report. I'm going

to check with my probation staff, and we're going to find out whether I can put an adjunct to that for assisting this defendant in getting some information about alcohol and psychological issues that may assist us in terms of profile, and whether or not a conditional sentence is appropriate to be considered here.

MR. SAGER: That would be excellent.

THE COURT: I don't know what I can do. I will, this afternoon, speak on a recess, with our probation services, but at a minimum, I'm going to be ordering a pre-sentence report. Did you want to make a comment then with respect to - so we know the date, the 12th of September at 2:15 in court room 201, for sentence. A pre-sentence report is ordered. With respect to the issue of driving prohibition, Mr. Ghosh has made his submission in the circumstances here, for a two year driving prohibition. Is that correctly stated?

MR. GHOSH: Yes, Your Honour, thank you.

MR. SAGER: I guess what we have, is Mr. Dunlap's licence was suspended shortly after this, so he's been without a licence now for a year and a half. I think once he's convicted, the Department of Transport will also suspend his licence for a year, so effectively he will have a two and a half year suspension by the time we finish with this, almost a three year suspension will already been imposed.

MR. GHOSH: Just so I understand, if I need to respond. Is my friend arguing against the

Crown's submission for the quantum of the prohibition, or is he submitting for the delay in the commencement in the prohibition?

MR. SAGER: No, just the prohibition itself.

MR. GHOSH: Okay, so a shorter period, my friend's advocating for. I see my friend's proposing 12 months. But I'm asking for two years.

THE COURT: I've heard your submissions then. So we have everything in position?

MR. SAGER: Yes.

THE COURT: Thank you. I'm going to be adjourning sentence in relation to this matter to the 12th of September, 2008, at 2:15 in court room 201. A pre-sentence report will be ordered. If I'm able, I will augment that to include a risk assessment both with regard to alcohol and psychological issues. The exact wording I'm not clear on, but I'll be speaking to the probation staff, and if Mr. Dunlop wishes to remain, he may do so, but I will amplify the request for the pre-sentence report to include what I can in that respect. I think it would be a good idea if he does stay, because there may be some consents that he might have to sign in relation to that being done.

MADAME CLERK: Yes, he'll have to see the probation officer before he goes.

THE COURT: So I think that's important.

MR. SAGER: Where would you want him to wait, Madame Clerk?

MADAME CLERK: He can....

MR. SAGER: He can sit outside the probation office?

MADAME CLERK: Outside the court room until we find out exactly what's going on, and then I'll direct him.

R E A S O N S F O R S E N T E N C E

WRIGHT, J.: (Orally)

Secondly, on the issue of the driving prohibition, I am instructed in relation to section 255(2) of the Criminal Code, upon which the defendant entered a plea, that everyone who commits an offence under this section, thereby causing bodily harm to any person, is guilty of an indictable offence, and liable to imprisonment to a term not exceeding ten years.

This is a serious charge. The facts and circumstances here are particularly egregious. The defendant went across several lanes of traffic and was out of control, highly impaired, high blood alcohol concentration, more than twice the legal limit, collided with not one, but two cars. I have the victim impact statements that describe the nature of the criminal act that was committed by the defendant, that it has had upon them.

In all of the circumstances, I then take into consideration section 259(2)(b) which provides that an offender convicted of an offence under

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255(2) upon which this defendant finds himself convicted, provides that during any period not exceeding ten years a prohibition, plus any period to which the offender is sentenced to imprisonment, if the offender is liable to imprisonment, for more than five years, but less than life in respect to that offence. He certainly qualifies there. Two years is a measured, fair, and reasonable prohibition in the circumstances, and it will be imposed today.

Would you stand up please Mr. Dunlop? You are suspended from driving any motor vehicle in Ontario as may be provided by the Ministry of Transportation under the Highway Traffic Act. There will be a concurrent two year driving prohibition under the provisions of section 259. That will commence today. You will be required to sign a prohibition order before you leave here today.

Sentence is otherwise adjourned to the 12th of September, 2008 at 2:15 in court room 201. There will be information that my clerk will require in order to complete the requisition for the pre-sentence report, and I would suggest that you may wish to consider staying here until you have had an opportunity to speak with the probation officer so that you can sign any consents that are required. I am doing this to assist you, because your counsel has indicated to me that he is making a submission for a

conditional sentence.

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Mr. Ghosh has indicated that he feels you should go to jail. However, he has indicated under the principled approach that I could follow, set out by the Supreme Court of Canada, you may be eligible for a conditional sentence. I have to be satisfied that you meet the criteria for that, even before consider it. I can not do that on what has been placed before me today. Do you understand that sir?

MR. DUNLOP: Yes, I do, Your Honour.

THE COURT: Thank you.

MR. GHOSH: Thank you Your Honour.

THE COURT: We'll stand this matter down. Thank you very much.

MR. SAGER: Thank you Your Honour.

THE COURT: Did the letter from the mother come back Mr. Sager?

MR. SAGER: Oh. Here it is. I apologise.

THE COURT: That is Exhibit Number...

MADAME CLERK: Four.

THE COURT: ...five. Well the updated letter from the mother is Exhibit 4, that's correct. We're missing that letter.

MR. SAGER: Bear with me one second. I just....

THE COURT: The mother has it still or did she give it back to you?

MR. SAGER: No, she just gave it to me.

THE COURT: Oh, I see, okay. Mr. Ghosh, would you like to have a look at this?

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MR. GHOSH: Oh, that would be lovely, thank you.

THE COURT: All right. Can that exhibit then be returned please?

MR. GHOSH: Yes, Your Honour.

THE COURT: Thank you.

MR. GHOSH: Here it is.

MADAME CLERK: Thank you.

MR. GHOSH: There's some hand written entries by Mrs. Dunlop.

THE COURT: Fine thank you.

...

R E C E S S

U P O N R E S U M I N G :

MR. GHOSH: Yes Your Honour....

MS. SEGAL: Good afternoon Your Honour. Perhaps I can address - for the record, Segal, initial "M". Partly because of my nature, I wanted to speak to the counsel on that sentencing matter, the Dunlap - or Dunlop - I thought it was Dunlop.

THE COURT: Dunlop.

MR. GHOSH: Dunlop.

MS. SEGAL: Right. I heard Dunlap several times. I didn't know, but it appears it's Dunlop. So I walked outside, and unfortunately his counsel had left, and I began to speak to this gentleman about perhaps what Your Honour was or was not looking for before making a determination on sentencing, just to assist as an officer of the court since a lawyer wasn't there. Due to my disposition, I managed to get out of this

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gentleman that he - his counsel is not a lawyer. So - well the first thing I did, was I attended the court and asked the clerk for the information, because of the nature of the charges, and saw that they are by indictment, so that caused me concern because my understanding is a non-lawyer can not proceed as counsel on indictable matters, although, who knows if the Law Society has changed that law. They certainly have some new interesting laws in terms of paralegals, which I'll get into in a moment. That was my first concern. I then did some investigation of - along with the court staff - that were quite helpful because my inability to Google fast enough on all occasions, and I don't mean to make fun of any of this. I'm - it's sort of my nature, and I called - we looked on the website, and it appears as if he's a paralegal candidate. I called the number. I think it is a cell phone. We did some other investigation, and I think it's safe to say, subject to Mr. Sager appearing on his own, that he is not a lawyer. I then spoke to the Law Society to find out an address so I could confirm that the address on the - attached to the information was different. For a lawyer, you can find it on the website, the address, but for a paralegal candidate, it doesn't have their address, and when I asked the Law Society this afternoon during the break for his address, for confidentiality reasons, I'm not allowed to know a paralegal's address, which is quite ironic considering for a lawyer you

can. So I spoke further to this gentleman, explained to him that if in fact he's not a lawyer, he cannot proceed - subject to Your Honour's views of course - any further, because has proceeded by way of indictment. So that's sort of what has transpired. I've explained to this gentleman that he needs to - he should have a lawyer because of the nature of the charges. He is - appears to be, although I haven't spoken to him at great length, he is very concerned about this and - so I understand at one point attempts were made to have his counsel removed from the record, to no avail. So I don't know really much about that, but I think they've been having some personal issues for some time, and he certainly needs to get a lawyer. Now the other problem - so that's really the first issue I can address. If there's other issues - and I'm acting as an officer of the court - that need to be addressed, I'm here to assist.

MR. GHOSH: First of all Your Honour, I very much appreciate my friend Ms. Segal flagging this concern which went by me. I can advise the court to the best of my recollection; Mr. Sager specifically represented himself to me in all our dealings, as a lawyer. The court record will reflect on all of his documentation - there is actually a designation of counsel filed from Mr. Sager's office, specifically outlining him as retained counsel. The counsel slips circle "counsel" "retained counsel" as opposed to the "agent" box. Everything before the court as well

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as in the Crown file and all of Mr. Sager's dealings with my prior colleagues reflect our understanding and apparently the court's understanding of Mr. Sager putting himself to the court and to the Crown's office as counsel. so if it wasn't for Ms. Segal's industriousness, this issue would never have been flagged at all. I'm highly troubled by these circumstances and Mr. Sager of course, should have an opportunity to answer for himself on what seems to have transpired. But from my understanding I share Ms. Segal's concerns. I don't believe a non-lawyer can appear on indictable matters, and these are very serious charges, and I'm in Your Honour's hands as to procedurally, what we should do. We've made efforts to contact Mr. Sager, once this issue was flagged, over the break, and to no avail. Mr. Sager has not picked up his cell phone. That's the only contact information we have. So I'm - I'll certainly take Your Honour's guidance on where to go from here.

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THE COURT: Well there are two things, and I thank counsel very much for your assistance on this matter. My clerk advised me that there was an issue with regard to Mr. Sager's apparent status, that is to say whether he is in fact a lawyer, practising at the pleasure of the Law Society of Upper Canada, by what I now understand to be a licence, or whether he's in some other status. And that's all broken in the last - within the course of the past hour or

there about. It's now almost five o'clock. The first order of business dealing with that issue of course is to have Mr. Sager back here as soon as possible. I'm going to be here tomorrow, which is June the 11th in court room 303.

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MS. SEGAL: Can interrupt - and I apologise. It's also my nature. I'm actually before Your Honour commencing Friday, on a five day matter.

THE COURT: Yes.

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MS. SEGAL: And this gentleman now lives in North Bay with his mother. I don't mind, since I'm going to be before Your Honour on Friday, to have this matter adjourned to Friday to speak on this gentleman's behalf for that limited purpose.

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THE COURT: Perhaps you could make efforts to reach Mr. Sager and indicate that his - he is required to be here.

MS. SEGAL: Certainly.

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THE COURT: Because I need to find out, I think we all need to find out, and clarify just exactly what Mr. Sager's status is. I mean, we can talk about having made inquiries and so forth, and in the fullness of time, we may be able to get more information that would...

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MS. SEGAL: All right.

THE COURT: ...allow us to make a more informed decision. That's not to say that the information we have now is not entirely accurate. I just simply want to be sure. These are serious matters...

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MS. SEGAL: Agreed.

THE COURT: ...in terms of conduct. Secondly, in relation - and by the way, just before I finish, I note that amongst other documents, my clerk has just placed before me a document which is dated the 10th of January, 2008, date stamped the 24th of January, 2007, "I Derek Dunlop appoint Steven R. Sager as my retained counsel of record, to represent me, and to take all steps necessary before the Ontario Court of Justice in my absence relating to the charge of impaired driving causing bodily harm, two counts, and operate over 80." And if we go through the documentation it indicates at the bottom of this document, "I Steven R. Sager, a barrister, hereby accept the appointment of Derek Dunlop as his counsel of record, to fully represent the accused's interests in the absence of the accused in relation to the charge of impaired causing bodily, two counts, and two, operate over 80." It's dated the 16th of January 2008. It bears a signature under which are inscribed in type form, "Signature of Counsel, address, 115 Torbay Road, Markham, Ontario, L3R 2M9, phone number 416-525-5346, fax number 416-284-1826." Now I have a great number of other documents here as well, but those documents - or that document - excuse me - may appear to be of some assistance.

MADAME CLERK: He does have a new address Your Honour. This is his counsel slip from today.

THE COURT: Counsel slip from today, my clerk has advised me, indicates S.R. Sager, 70 East Beaver

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Creek, Suite 201 - 70 East Beaver Creek, Suite 201. I believe that to be in the municipality of Richmond Hill. 416-525-5346 is his direct line. There's also a secondary direct line, at 416-284-2065, and a fax number 416-284-1826. I think that's the first order of business. The second order of business deals with the issue of the status of these proceedings, and as of right now, I found Mr. Dunlop guilty of the offence of impaired driving causing bodily harm. I don't think it comes as any trade secret that despite Mr. Sager's involvement I conducted a thorough and comprehensive plea inquiry with the defendant, and only after obtaining his consent as it were, and receiving of the answers that I'm required to receive as a jurist, conducting such an inquiry, did I proceed. Secondly, I was - reminded the defendant of that fact today, and had him acknowledge directly, in conversation with the court, his acknowledgement of the facts, and so I'll leave it to you Mr. Ghosh to decide where that leaves Mr. Dunlop insofar as these proceedings. I am of course, very troubled. These are indictable matters. Mr. Sager on the other hand - or Mr. Dunlop on the other hand is entitled to representation by counsel, indeed it's required. The matter of sentence has been put over to the 12th of September, 2008 at 2:15 in court room 201. A pre-sentence report has been ordered with specific inquiries regarding substance abuse, and alcohol, and psychological issues, as foci

for the preparation of the report. I also imposed a two year driving prohibition upon the defendant today. In my review of the release documentation appended to the information, Mr. Dunlop is on a recognisance not to operate a motor vehicle, meaning that he cannot operate a motor vehicle in relation to the recognisance that is before the court in any event. I'm not entirely comfortable that the prohibition in the circumstances that I imposed today, which is in effect, part of the sentence regime, can stand. It may be that it can, but it seems to me that ultimately we have to determine the status of Mr. Sager before this court, I think, is in a position to confirm sentence. I may be wrong on that, but I'm prepared to err on the side of caution. In view of the fact that there's a recognisance that prohibits Mr. Dunlop from operating a motor vehicle, it seems to me that the protection of the public, which I'm safeguarding here as well as the interests of the defendant would be served and not to the prejudice of the defendant who is under such an obligation in any event.

MS. SEGAL: Right.

MR. GHOSH: That's quite fine Your Honour.

MS. SEGAL: Yes.

THE COURT: Does that sound reasonable?

MR. GHOSH: Certainly.

MS. SEGAL: Very.

THE COURT: So I'm not going to require that the defendant sign the prohibition today, but it has

been prepared, and we can leave that to be spoken to on the 13th then. Is that what you're suggesting?

5 MS. SEGAL: Yes, and - yes, and due to the lateness of the day, first of all, and what's happened, is - do we need to address the issues on the pre-sentence report yet? Are they still open now to deal with those issues? No. Should we address them on the 13th?

10 THE COURT: Well we can do that. I don't think that much matters if we hold off until the 13th.

MS. SEGAL: All right.

THE COURT: That's fine.

15 MS. SEGAL: But I would request though, just asking as an officer of the court, that since he is going to be returning to North Bay, I don't want to act as Mr. Sager's agent.

20 THE COURT: I think Mr. Dunlop - I'm sorry to interrupt you Ms. Segal. I think Mr. Dunlop has enough interest in this that he'll be back on the 13th. This is important.

MS. SEGAL: Okay.

25 THE COURT: The Crown has proceeded by indictment, meaning they're looking for a jail sentence.

MS. SEGAL: He'll come back.

30 THE COURT: This is an important matter. I think he should be back here on that date. If that's the date on which this matter's going to be coming back to court, and it should be no later than the 13th. I would prefer it to be tomorrow, but I understand the exigencies of time being

what they are. I won't be here on the Thursday.
So Friday looks like the best day.

MS. SEGAL: I don't have a - I mean look, I think
it makes more sense to have it - if you can make
a phone call to Brampton to have my matter held
down 'til 10:30 I can appear here at 9:30

tomorrow morning. I have a trial in Brampton,
but it's out of custody, and since they are
leaving tomorrow for North Bay, would that be
better to come tomorrow morning? Is that okay?

THE COURT: I can't make any guarantees Mr.
Dunlop that we're going to do anything other
than have this matter traversed to Friday, but
we may be able to deal with something tomorrow
that would be constructive.

MR. GHOSH: I'm happy to call. The one concern
is, are we getting Mr. Sager here on short
notice.

MS. SEGAL: Well, at least we can find out what
his status is. I can try and make inquiries to
speak to him.

THE COURT: Well you can tell Mr. Sager if you
are able to make contact with him, that the
court is most concerned about this matter and
anxious that he attend.

MS. SEGAL: All right.

THE COURT: I don't know that I can necessarily
order him to attend, but I would be indebted to
counsel if you can make inquiries as to whether
I have the jurisdiction to do so, because if I
can, I most certainly will order him to come
here for Friday.

MS. SEGAL: All right. Mr. Ghosh and I are going to attend the Crown's office now, and make that phone call together.

MR. GHOSH: We will do that.

MS. SEGAL: And what court room is Your Honour in tomorrow morning?

THE COURT: Three-o-three.

MS. SEGAL: I will be here at 9:30.

THE COURT: Judicial pre-trials.

MADAME CLERK: So you want the information to go to tomorrow?

THE COURT: Yes, please. So Mr. Dunlop will be here tomorrow and may be returning on Friday the 13th.

MS. SEGAL: All right. We'll see if we can have it dealt with tomorrow.

THE COURT: All right Mr. Ghosh?

MR. GHOSH: I appreciate that.

THE COURT: In the meantime Mr. Dunlop, I remind you sir, that even though the prohibition order has been made, and you have not yet signed it, it may be that that order will go into effect ultimately, in any event, but even if that isn't the case, you are under your recognisance of bail, not permitted to operate a motor vehicle. Do you understand that sir?

MR. DUNLOP: Yes.

THE COURT: And I expect you to obey that order.

MR. DUNLOP: Can I ask you a question? Is that retroactive beginning today?

MS. SEGAL: The bail order has been in effect for some time already.

THE COURT: I don't - I can't answer that question.

MADAME CLERK: Well, I can tell you Your Honour that everything's dated for today. I'm going to have to endorse the information that the driving prohibition was ordered today, because that's the day...

MR. GHOSH: It was ordered.

MADAME CLERK: ...it was ordered, so I don't know that holding it back and everything is going to make a difference, for as long as it's a standing order.

THE COURT: All right.

MADAME CLERK: Like, I mean, if it....

THE COURT: Okay, Mr. Dunlop, my clerk makes a good point. This is an order. The fact that you haven't signed it doesn't mean that it's any less effective. The prohibition order is in effect. I can vacate that order, and I will if I feel that it's the appropriate thing to do. I think we have some sorting out here to do in the next 24 to 72 hours.

MR. DUNLOP: Yes, sir.

MR. GHOSH: Your Honour I'm indifferent to that as well. If Your Honour feels fairness dictates that you vacate it, I'm fine with that. I'll leave it entirely to you.

MS. SEGAL: We could address that issue in the morning again, Your Honour.

THE COURT: Let's deal with that in the morning. In the meantime, it stays in effect, and there's recognisance that requires him not to drive.

MADAME CLERK: I understand that, but if we don't vacate it now, I have to endorse it on the information because it's dated for today's date. We cannot backdate. So I'll have to endorse it and it will go to M.T.O.

THE COURT: All right, well, I think in the circumstances I'm going to vacate the order then.

MR. GHOSH: That's fine. That makes sense.

THE COURT: It seems to me it's a function of sentence. There is some peril here for sure, and there is a status concern with regard to Mr. Sager. So I am going to strike the prohibition order at this time as a function of sentence on - again, reminded, and Mr. Dunlop is reminded as well, that there is a recognisance of bail that prohibits him from operating a motor vehicle, so in effect the public is protected, and matters remain as they should for the time being. All right.

MS. SEGAL: Thank you.

MR. GHOSH: Thank you Your Honour.

THE COURT: Nine-thirty then, court room 303 tomorrow morning.

MADAME CLERK: The P.S.R. stands?

MR. GHOSH: Perhaps we can post it to tomorrow, and....

THE COURT: Does that have to be attached to something?

MADAME CLERK: It has to go to the probation office. It's too late for him to speak to the probation officer today; he'll have to do it

tomorrow anyway...

THE COURT: Let's wait until tomorrow.

MADAME CLERK: ...and I can give him a sheet and he...

MR. GHOSH: Sure.

MADAME CLERK: ...can see the probation officer tomorrow, but this will go in her tray, and be endorsed.

THE COURT: Well....

MS. SEGAL: I'm sorry, Your Honour, that I....

THE COURT: No, no. I'm just trying to think how we can deal with that. Why could we - could we not requisition the pre-sentence report tomorrow then, or wait until Friday even to do that? It seems to me that might be the better way to do it.

MADAME CLERK: If you want to vacate that too, and do it again?

THE COURT: I think so. I think we should do that. What you can do, since you've taken the time - no, don't - don't throw it away, just put the word "vacated" on that. Staple those documents to the information. We can always discard them, if it becomes necessary either tomorrow or Friday, or not, as the case might be. Well, it will be discarded one way or the other, but they may be - they may provide reference to other proceedings.

MR. GHOSH: Yes. Your Honour we have discovered, at least tentatively, subject to Mr. Sager telling us otherwise, that Mr. Sager is a paralegal candidate for licensing with the Law

Society. He is not a licensed paralegal with the Law Society.

THE COURT: Where did this information come from please?

MR. GHOSH: The - we checked the Law Society website, where Mr. Steven R. Sager is a paralegal candidate, and there is a description under the Law Society when you canvass what that designation means, and - I'll leave it up to....

MS. SEGAL: And the court reporter actually, found an excerpt from submissions about licensing for paralegals, if I can pass that up to Your Honour.

THE COURT: Why don't we just wait and show him....

MS. SEGAL: We'll just wait 'til tomorrow.

THE COURT: Let's wait and see where we are with Mr. Sager...

MS. SEGAL: Okay, sure.

THE COURT: ...first.

MS. SEGAL: Okay.

MR. GHOSH: Yes.

THE COURT: Maybe something happened in the last 24 hours that changes all this, I don't know.

MR. GHOSH: That's right.

THE COURT: I don't want to put the cart before the horse just yet.

MR. GHOSH: Certainly.

THE COURT: But thank you Ms. Segal, for this information, whether it's in your nature or not.

MR. GHOSH: No, it's very helpful indeed.

MR. DUNLOP: I apologise Your Honour.

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THE COURT: You don't have to apologise to anybody Mr. Dunlop, but thank you anyway for your concern. My angst here is obviously to get it right, and be fair.

MR. DUNLOP: Yes.

MS. SEGAL: All right. Thank you and thank you to the court staff for their help.

THE COURT: Thank you very much for staying.

M A T T E R A D J O U R N E D

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CERTIFICATE OF TRANSCRIPT (SUBSECTION 5 (2))

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Evidence Act

I, **Tricia Rudy**, certify that this document is a true and accurate transcript of the recording of **R. v. Derek J. Dunlop** in the Ontario Court of Justice, held at Newmarket, Ontario, on June 10, 2008, taken from Recording 4911-303-0209/08, 4911-303-0210/08, 4911-303-0211/08, which have been certified in Form 1.

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Aug 22/08

Tricia Rudy

(Date)

(Signature of authorized person)

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Transcript Order Received:	June 13, 2008
Transcript Completed:	June 20, 2008
Notified Ordering Party:	June 21, 2008

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